Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: November 22, 1996 **Released:** November 22, 1996

Comment Date: December 20, 1996
Reply Comment Date: January 3, 1997

By the Commission:

I. INTRODUCTION

1. The purpose of this proceeding, part of the Commission's implementation of the Telecommunications Act of 1996 (the 1996 Act),[1] is to adopt rules implementing new Section 259 of the Communications Act of 1934 (the Act), as amended.[2] Section 259 generally requires an incumbent local exchange carrier (incumbent LEC)[3] to make available to a defined "qualifying carrier," such "public switched network infrastructure, technology, information, and telecommunications facilities and functions" as the qualifying carrier may request, in service areas

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the 1996 Act").

[2] The Communications Act of 1934, as amended, 47 U.S.C. §§ 259, *et seq.* ("the 1934 Act" or "the Act").

[3] Section 251(h) of the Communications Act defines incumbent local exchange carriers as follows:

> (1) DEFINITION -For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that -
> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and
> (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
> (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

47 U.S.C. § 251(h).

where the qualifying carrier has requested and obtained designation as an eligible carrier under Section 214(e).[4] Section 259(a) directs the Commission to prescribe regulations that implement this requirement within one year after the date of enactment of the 1996 Act, *i.e.*, by February 8, 1997.[5]

2. With the 1996 Act, Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[6] The statute imposes obligations and responsibilities on telecommunications carriers, particularly incumbent LECs, that are primarily designed to open telecommunications markets to competitive entry, to promote universal service, and to lessen the need for government regulation. This rulemaking is thus one of a number of interrelated proceedings designed to promote competition, reduce regulation in telecommunications markets where appropriate, and preserve and advance the provision of universal service.[7] In this *Notice of Proposed Rulemaking*, we generally seek comment on what regulations the Commission should adopt to implement Section 259.

II. BACKGROUND

3. In the 1996 Act, Congress moved to restructure the local telecommunications market so as to remove legal and economic impediments to market entry that existed under the monopoly paradigm. A key aspect of this restructuring is to require incumbent LECs to offer to requesting telecommunications carriers interconnection, unbundled network elements, and telecommunications services at wholesale rates for resale.[8] By permitting carriers to enter markets through resale and the acquisition of unbundled network elements, the 1996 Act dramatically increases the opportunities for competitive entry and reduces the existing competitive advantages of large established carriers. At the same time, Congress acted to ensure that access to the evolving, advanced telecommunications infrastructure would be made broadly available in all regions of the nation at just, reasonable and affordable rates.[9] Consistent with these two major

[4] 47 U.S.C. § 214(e).

[5] 47 U.S.C. § 259(a).

[6] S. Conf. Rep. No. 104-230, 104th Cong., Sess. 1 (1996) ("Joint Explanatory Statement").

[7] *See, e.g.*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, CC Docket No. 96-98, FCC 96-325, 61 Fed. Reg. 45476 (rel. Aug. 8, 1996) ("*Local Competition First Report and Order*"). We note that the U.S. Court of Appeals for the Eighth Circuit has stayed the pricing rules developed in the *Local Competition First Report and Order*, pending review on the merits. *Iowa Utilities Board v. FCC*, No. 96-3321, (8th Cir., Oct. 15, 1996). *See also* Federal-State Joint Board on Universal Service, *Recommended Decision*, CC Docket No. 96-45, FCC 96J-3 (rel. Nov. 8, 1996) ("*Joint Board Recommendation on Universal Service*").

[8] 47 U.S.C. § 251(b)(5), (c)(2), (c)(3). We note that Section 251(b)(5) applies to all LECs, *i.e.*, including incumbent LECs.

[9] 47 U.S.C. § 254(b).

goals, the 1996 Act created new Section 259 which imposes on incumbent LECs an obligation to make available, under certain conditions, public switched network infrastructure and other capabilities to qualifying carriers that are fulfilling universal service obligations.[10]

A. Overview of Section 259

4. Section 259(a) directs the Commission, within one year after the date of enactment of the 1996 Act, to prescribe regulations that require incumbent LECs to make certain "public switched network infrastructure, technology, information, and telecommunications facilities and functions" available to any qualifying carrier in the service area in which the qualifying carrier has requested and obtained designation as an eligible carrier under Section 214(e).[11] Section 259(b) directs the Commission to refrain from requiring actions by incumbent LECs that are economically unreasonable or contrary to the public interest.[12] The Commission may permit, but shall not require, joint ownership or operation of public switched network infrastructure and services,[13] and must ensure that incumbent LECs are not treated as common carriers by virtue of exercising their Section 259 obligations.[14] Section 259(b) further directs the Commission to establish guidelines implementing infrastructure sharing pursuant to just and reasonable terms and conditions that permit the qualifying carrier to "fully benefit" from the economies of scale and scope of the incumbent LEC.[15] The Commission must establish conditions to promote cooperation between incumbent LECs and qualifying carriers.[16] The Commission may not require incumbent LECs to make available "services or access" that would

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[10] 47 U.S.C. § 259(a).

[11] Pursuant to Section 214(e), an eligible carrier is entitled to receive universal service support. Section 214(e) further provides that, throughout the service area for which it has received such designation, an eligible carrier shall:

> (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
> (B) advertise the availability of such services and the charges therefor using media of general distribution.

47 U.S.C. § 214(e)(1).

[12] 47 U.S.C. § 259(b)(1).

[13] 47 U.S.C. § 259(b)(2).

[14] 47 U.S.C. § 259(b)(3).

[15] 47 U.S.C. § 259(b)(4).

[16] 47 U.S.C. § 259(b)(5).

be provided to consumers by the qualifying carrier in the incumbent LEC's "telephone exchange area."[17] The Commission must also require the incumbent LEC to file with the Commission or state "any tariffs, contracts, or other arrangements that show rates, terms, and conditions" under which the incumbent LEC is making available "public switched network infrastructure and functions" pursuant to Section 259.[18]

5. Section 259(c) requires incumbent local exchange carriers that have entered into infrastructure sharing agreements to "provide to each party to such agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment."[19] Section 259(d) defines a "qualifying carrier" as a telecommunications carrier that:

> (1) lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to this section; and (2) offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under Section 214(e).[20]

Section 214(e) provides that a common carrier designated as an eligible telecommunications carrier shall be eligible to receive universal service support and shall, throughout the service area for which designation is received, offer services that are supported by federal universal service support mechanisms promulgated under Section 254(c),[21] either by using its own facilities or a combination of its own facilities and resale of another carrier's services. Section 214(e) also states how eligible telecommunications carriers shall be designated.

III. IMPLEMENTATION OF SECTION 259

6. As an initial matter, we believe that we should adopt rules and guidelines in this proceeding that, in every case, promote the development of competition and universal service. We believe, moreover, that any significant variance between our implementation of Section 259 and our implementation of other sections of the 1996 Act would undermine these two important and interrelated goals of promoting the development of competition and universal service. To this end, we tentatively conclude that the requirements of Section 259 should be interpreted,

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[17] 47 U.S.C. § 259(b)(6).

[18] 47 U.S.C. § 259(b)(7).

[19] 47 U.S.C. § 259(c).

[20] 47 U.S.C. § 259(d)(1), (d)(2).

[21] 47 U.S.C. § 254(c).

wherever possible, as complementary to the Commission's implementation of other sections of the 1996 Act. We note that Section 259 is codified within a newly designated Part II of Title II of the 1934 Act, which part Congress designated "Development of Competitive Markets." We conclude, for example, that terms used in Section 259 should be defined as they have been defined in other Commission proceedings implementing the 1996 Act, except where Section 259 clearly imposes a different definition. We seek comment on these tentative conclusions.

7. We also tentatively conclude that the best way for the Commission to implement Section 259, overall, is to articulate general rules and guidelines. We believe that Section 259-derived arrangements should be largely the product of negotiations among parties. We seek comment on these tentative conclusions and the desirability of such an approach to implementing Section 259.

A. Requirements of Section 259(a)

8. Section 259(a) requires the Commission to prescribe by February 8, 1997:

> [R]egulations that require incumbent local exchange carriers (as defined in section 251(h)) to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e).[22]

9. We seek comment on how we should interpret the scope of this requirement. As an initial matter, we seek comment on what is included in "public switched network infrastructure, technology, information, and telecommunications facilities and functions . . . ."[23] Specifically, we seek comment on what constitutes "public switched network infrastructure" for the purposes of Section 259(a). Likewise, we seek comment on whether and how we should define the terms "technology, information, and telecommunications facilities and functions" to further the statutory goals of Section 259(a). What definitions for these terms would provide necessary or desirable flexibility as technology continues to evolve? We believe that how these terms are defined has specific implications for the overall scope of Section 259 and how Section 259 relates to other sections of the 1996 Act. We seek comment on whether other provisions in the statute, or its legislative history, can provide guidance on these issues.

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[22] 47 U.S.C. § 259(a).

[23] *Id.*

10. We note, for example, that there could be an overlap between those "telecommunications facilities and functions" that are the subject of Section 259(a) and interconnection, unbundled network facilities, and resale made available pursuant to Section 251(b) and (c).[24] We seek comment on whether Section 259(a)-provided "telecommunication facilities and functions" could include, for example, access to rights-of-way and resale made available under Section 251(b), interconnection made available under Section 251(c)(2), and unbundled network elements made available under Section 251(c)(3). Because "telecommunications facilities and functions" in Section 259(a) is stated without terms of limitation, we might conclude that resale, interconnection, and unbundled network elements are included within the scope of Section 259(a). We seek comment on such a conclusion and on its implications. We note that there are statutory differences that distinguish who may obtain access to an incumbent LEC's network under Section 251 and who may obtain access under Section 259. Section 251(c), for example, requires incumbent LECs to provide interconnection and network element unbundling to all requesting telecommunications carriers, including carriers that plan to compete with the incumbents in the incumbents' service areas.[25] On the other hand, Section 259(b)(6) provides that an incumbent LEC shall not be required to "engage in any infrastructure sharing agreement for any services or access which are provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area."[26]

11. In other words, Section 259 appears to apply only in instances where the qualifying carrier does not seek to offer certain services within the incumbent LEC's exchange area, whereas Section 251 plainly contemplates access by new entrants that seek to provide local exchange or exchange access service within the incumbent's service area. We seek comment on the implications of this distinction for our implementation of Section 259. Based on this distinction, for example, we could conclude that Section 259(a) provides a comprehensive -- and exclusive -- statutory means for a qualifying carrier, defined pursuant to Section 259(d), to obtain "public switched network infrastructure, technology, information, and telecommunications facilities and functions" from an incumbent LEC where the qualifying carrier does not propose to use these to compete in the incumbent LEC's service area. We seek comment on this approach. We also seek comment on the implications of this approach for qualifying carriers that might want to obtain certain "telecommunications facilities and functions" as unbundled network elements pursuant to Section 251(c)(3). We seek comment on whether the limitation provided in Section 259(b)(6) means that qualifying carriers must take, for example, resale, interconnection, and unbundled network elements exclusively pursuant to Section 259 where the qualifying carriers do not propose to compete in the incumbent LEC's telephone exchange area.

12. Interpreting the scope of Section 259(a) to be relatively narrow would appear to be supported by its requirement that only qualifying carriers, defined pursuant to Section 259(d),

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[24] 47 U.S.C. § 251(b), (c). *See also Local Competition First Report and Order* at Sections IV., V., VIII.

[25] 47 U.S.C § 251(c)(2), (c)(3).

[26] 47 U.S.C. § 259(b)(6).

may obtain Section 259 arrangements from incumbent LECs. As discussed in greater detail below, qualifying carriers are defined as carriers that lack economies of scale or scope and that request and obtain designation to receive universal service support pursuant to Section 214(e).[27] Such a definition would appear to apply to many small LECs. Does this observation support a conclusion that Congress primarily, or exclusively, intended Section 259 to benefit small carriers in an effort to advance the universal service goals of the 1996 Act? Would such a conclusion support a Commission decision to construe the provisions of Section 259 so as to apply only to cases involving small LECs? Did Congress further intend Section 259 to apply only to arrangements between such qualifying carriers and their adjacent incumbent LECs? We seek comment on all these questions and issues.

13. It might be possible, however, to interpret the scope of Section 259 and its relationship to Section 251 in a very different way. Neither Section 251, on its face, nor the Commission's Orders in CC Docket No. 96-98 would appear to prohibit qualifying carriers, defined pursuant to Section 259(d), from obtaining access to rights-of-way, resale facilities, interconnection, and unbundled network elements pursuant to Section 251 (*i.e.*, outside the framework of Section 259 with its apparent restrictions on competition). Could the Commission conclude that Section 251 grants rights of access to rights-of-way, resale, interconnection, and access to unbundled network elements, on terms that also satisfy Section 259 criteria, as types or examples of "telecommunications facilities and functions"? Can and should the Commission find that qualifying carriers must take such resale, interconnection, and unbundled network facilities pursuant to Section 251? Should the Commission give qualifying carriers the option to obtain access alternatively pursuant to Section 251 or Section 259, or should the Commission apply Section 259 only to elements of "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that are *not* otherwise provided pursuant to Section 251?

14. Besides promoting infrastructure development on behalf of qualifying carriers, requiring qualifying carriers to take, for example, interconnection and unbundled network elements pursuant to Section 251(c) -- and instead of pursuant to Section 259 -- also might tend to promote competition in local exchange markets. As discussed above,[28] Section 259(b)(6) does not require incumbent LECs to "engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area." No such limitation on the incumbent LEC's obligations appears in Section 251, and, consequently, qualifying carriers would be free, pursuant to Section 251, to use interconnection and unbundled network elements whether or not they intended to compete in the providing incumbent LEC's telephone exchange area.[29] We seek

[27] 47 U.S.C. § 259(d). See also *Joint Board Recommendation on Universal Service* at ¶¶ 155, *et seq.* (discussing eligibility criteria for carriers seeking universal service support).

[28] *See infra* Part III. B.

[29] *See generally Local Competition First Report and Order* at Sections IV., V., IX.

comment on this approach to defining the overlap between Sections 251 and 259 and on the consequences of such an approach for promoting the development of competition, particularly in rural markets.

15. Each element of public switched network infrastructure, technology, information, and telecommunications facilities and functions made available pursuant to Section 259 might very well pose unique questions and issues for this proceeding. For example, does the sharing of technology require mandatory patent licensing to qualifying carriers so that these carriers can develop equipment or software that is fully interoperative with proprietary systems (if any) deployed by an incumbent LEC? In cases where licensed technology is the only means to gain access to facilities or functions subject to sharing requirements, we tentatively conclude that Section 259 requires mandatory licensing, subject to the payment of reasonable royalties, of any software or equipment necessary to gain access to the shared capability or resource by the qualifying carrier's equipment. We seek comment on this tentative conclusion.

16. We also seek comment on what types of information must be made available to qualifying carriers by incumbent LECs pursuant to Section 259(a). Is marketing or other proprietary business information subject to this requirement? Does the information sharing mandated by Section 259(a) imply any sort of joint network planning requirement? Does Section 259(a) require incumbent LECs to make network information databases (other than those already required to be made available pursuant to Section 251(c)(3)[30]) available to qualifying carriers? If so, how? We seek comment on whether and how network information made available pursuant to Section 259(a) might vary from that type of information to be disclosed under Section 251(c)(5), which requires reasonable public notice of changes in the information necessary for transmission and routing of services using the incumbent LECs' facilities or networks.[31]

17. Generally, we believe that the rules implementing Section 259(a) should be definitive enough so as to minimize disputes between or among the parties to Section 259 agreements. At the same time, we also believe that the rules should not be so restrictive that they inhibit the Commission's ability to act flexibly to resolve disputes that may arise. We seek comment about how best to achieve these goals, particularly given our preference, as stated above, that Section 259-derived arrangements should be largely the product of negotiations among parties.[32] We address *infra* specific issues relating to resolving disputes between parties to Section 259 agreements.[33] Here we note that Section 259(d) defines qualifying carriers based on decisions made by this Commission and the states. Does this joint responsibility have

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[30] *Local Competition First Report and Order* at ¶¶ 452-503.

[31] 47 U.S.C. § 251(c)(5).

[32] *See supra* Part III. at ¶ 7.

[33] *See infra* Part III. B.

implications for deciding who should resolve Section 259 disputes? We seek comment on these questions and issues.

18. The express language of Section 259(a), on its face, grants the Commission sole authority to create rules to implement this section.[34] We tentatively conclude that Section 259 by its express terms pertains to both interstate and intrastate communications. Further, it appears and we tentatively conclude that Section 259 contemplates only limited roles for the states, namely, pursuant to the filing provisions in Section 259(b)(7) and pursuant to the Section 214(e) designation power referenced in Section 259(d)(2). We seek comment on each of these tentative conclusions. To ensure a complete record, we also seek comment on whether we have authority to preempt state regulation under *Louisiana Public Service Commission v. FCC*, in the event that Section 259 does not apply to intrastate services, contrary to our tentative conclusion.[35]

19. Finally, we note that, while Section 259(a) refers to carriers that have "*requested* and obtained designation . . ."[36] as Section 214(e)-eligible carriers, Section 214(e) also provides that a state commission may designate a carrier as eligible on its own motion without a request.[37] In addition, the states, with respect to intrastate services, and the Commission, with respect to interstate services, shall designate a carrier as an eligible carrier to provide service in unserved areas.[38] In light of this provision, we seek comment on whether we can and should adopt regulations to impose Section 259(a) requirements on incumbent LECs where the state has designated a qualifying carrier as an eligible carrier pursuant to Section 214(e) without the carrier having requested designation.

B. Terms and Conditions Required By Section 259(b)

20. Section 259(b)(1) provides that the Commission shall not adopt regulations that would "require a local exchange carrier to which this section applies to take any action that is economically unreasonable or that is contrary to the public interest."[39] We seek comment on what the standard should be for determining whether an action is economically unreasonable or not in the public interest. In determining what is economically unreasonable, we tentatively conclude that no incumbent LEC should be required to develop, purchase, or install network infrastructure, technology, facilities or functions solely on the basis of a request from a qualifying carrier to share such elements when such incumbent LEC has not otherwise built or acquired and

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[34] 47 U.S.C. § 259(a) ("*The Commission shall prescribe* . . . ." (emphasis added)).

[35] *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).

[36] 47 U.S.C. § 259(a) (emphasis added).

[37] 47 U.S.C. § 214(e)(2).

[38] *See* 47 U.S.C. § 214(e)(3).

[39] 47 U.S.C. § 259(b)(1).

does not intend to build or acquire such elements. We seek comment on this tentative conclusion. We also seek comment on whether an action could be considered economically unreasonable even if the requesting qualifying carrier agrees to pay the costs associated with the request. We tentatively conclude that for a sharing request to be considered "economically unreasonable," the terms proposed by the qualifying carrier must be such that the providing incumbent LEC would incur costs that it could not recover. We seek comment on the implications of such a conclusion, including whether such recovery should allow the providing incumbent LEC a return on investment, and, how such a return should be calculated. We further seek comment on whether a providing incumbent LEC may withdraw from a sharing agreement if it later determines that such agreement is no longer economically reasonable. We recognize that such a conclusion may result in service disruptions for customers and seek comment on whether such disruptions would be contrary to the public interest.

21. Section 259(b)(2) allows the Commission to "permit, but . . . not require, the joint ownership or operation of public switched network infrastructure and services by or among such local exchange carrier and a qualifying carrier."[40] Joint ownership of shared network infrastructure with a qualifying carrier would thus appear to be one method by which an incumbent LEC may meet many, if not all, of its sharing obligations under Section 259, assuming the qualifying carrier agrees. We seek comment on this observation. As a corollary to this statutory provision, we believe that incumbent LECs and qualifying carriers should be able to share the risk of development and/or purchase and installation of network infrastructure. We believe that, in the absence of evidence that there are serious problems in making these arrangements, we should let the participating carriers develop terms and conditions through their own negotiations. Where a qualifying carrier makes a request to share infrastructure jointly owned by an incumbent LEC and one or more qualifying carriers, we propose to treat the joint owners as the providing incumbent LEC for the purposes of our infrastructure sharing regulations. We seek comment on this proposal. We also seek comment about the implications of sharing and, in particular, joint ownership for those carriers subject to the Commission's cost accounting rules.[41] Would such operations necessitate changes to Part 32 of the Commission's rules? While we recognize that sharing and, in particular joint ownership, pursuant to Section 259 may have implications for the treatment of jurisdictional separations under the Commission's rules,[42] we note that any changes to Part 36 of the Commission's rules would need to be addressed by a Federal-State Joint Board and are outside the scope of the current proceeding. We note that we will be instituting a separate proceeding in the near future to consider jurisdictional separations in light of the 1996 Act and technological changes. We believe that any implications of Section 259 for the treatment of jurisdictional separations would be better addressed in such a proceeding. We also seek comment on whether joint ownership of technology, information, and telecommunications facilities and functions, specifically listed in Section 259(a) but not included

[40] 47 U.S.C. § 259(b)(2).

[41] 47 U.S.C. Part 32.

[42] 47 U.S.C. Part 36.

in Section 259(b)(2), is permitted. In addition, we seek comment on methods for infrastructure sharing other than joint ownership that should be deemed to satisfy the requirements of Section 259.

22. Section 259(b)(3) provides that neither the Commission nor any state shall treat incumbent LECs as "common carrier[s] for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section."[43] We seek comment on whether and the extent to which Section 259(b)(3) imposes limits on the obligations of incumbent LECs to qualifying carriers (*e.g.*, tariffing requirements, obligations to expand capacity to meet the demands of qualifying carriers). Pursuant to Section 259(b)(3), Section 259 sharing agreements are not common carrier offerings and thus are not subject to the nondiscrimination requirement applied to common carriers in other sections of Title II. We seek comment, however, on whether the requirement that infrastructure sharing be made available "to *any* qualifying carrier" reflects an inherent nondiscrimination principle.[44] We thus seek comment on whether we can and should require incumbent LECs to make such arrangements available to similarly situated qualifying carriers on the same terms. In the absence of such a requirement, qualifying carriers could potentially receive unequal treatment from a providing incumbent LEC and this disparity could unjustly and unreasonably affect the ability of the qualifying carriers to compete with each other.

23. Section 259(b)(4) requires the Commission to adopt regulations to ensure that the providing incumbent LEC makes the "infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such [providing incumbent] local exchange carrier, as determined in accordance with guidelines prescribed by the Commission in regulations issued pursuant to this section."[45] We seek comment on how to ensure that qualifying carriers benefit fully from the economies of scale and scope of the providing incumbent LEC. Specifically, we ask whether "fully benefit" from economies of scale and scope necessarily implicates questions about pricing. Are there any "terms and conditions" other than price that could affect whether and how a qualifying carrier can "fully benefit" from the economies of scale and scope of the providing incumbent LEC? Does Section 259 confer on the Commission authority to promulgate rules or guidelines to govern the price of "infrastructure, technology, information, facilities or functions" made available by providing incumbent LECs? We seek comment on all these questions.

24. We seek comment on whether the Commission should establish other terms and conditions for infrastructure sharing agreements or whether the parties themselves and the state

[43] 47 U.S.C. § 259(b)(3).

[44] 47 U.S.C. § 259(a) (emphasis added).

[45] 47 U.S.C. § 259(b)(4).

commissions are better suited to establish such provisions. We note that national standards might reduce costs for incumbent LECs and qualifying carriers by reducing or eliminating inconsistent state regulations and simplifying record keeping and other administrative burdens. National principles could arguably increase the predictability of what terms might be considered "just and reasonable," and thereby facilitate negotiations and the resolution of disputes. We also seek comment on the potential consequences of not adopting national guidelines. For example, would a lack of consistent terms and conditions, even in contiguous service areas, create barriers to infrastructure sharing? We seek comment on these issues and, in general, on the best ways to ensure just and reasonable terms for infrastructure sharing, and ways to ensure that qualifying carriers fully benefit from the economies of scale and scope of the providing incumbent LEC.

25. Section 259(b)(5) requires the Commission to establish conditions that promote cooperation between incumbent LECs to which this section applies and qualifying carriers.[46] The Commission seeks comment on whether a good faith negotiation standard, established by either the Commission or the states, is required to promote cooperation between incumbent LECs and qualifying carriers. We tentatively conclude that, because agreements pursuant to Section 259 will be between non-competing carriers, detailed national rules may not be necessary to promote cooperation. Consistent with that expectation, we propose not to create any new procedures to resolve disputes that may arise involving Section 259, but to rely instead on informal consultations between the parties and the Commission and, if necessary, existing declaratory ruling procedures and the formal complaint process, including settlement negotiations and alternative dispute resolution. We seek comment on these tentative conclusions.

26. Section 259(b)(6) states that our regulations must not require infrastructure sharing "for services or access which are to be provided or offered to consumers by the qualifying carrier" in the providing incumbent LEC's telephone exchange area.[47] We tentatively conclude that this provision encompasses any telecommunications or information service offered by the providing incumbent LEC directly to consumers, or any access service offered to other providers which in turn offer services to consumers. In addition, we tentatively conclude that an incumbent LEC should not be required to share services or access, pursuant to Section 259(b)(6), that would be used by the qualifying carrier to compete in the incumbent LEC's telephone exchange service area. As noted above, we anticipate that such services or access would be available to the qualifying carrier under Section 251.[48] We seek comment on these conclusions.

27. Because Section 259(b)(6) does not mandate infrastructure sharing between competing carriers, we tentatively conclude that a providing incumbent LEC may terminate an agreement in the event it discovers that the qualifying carrier is offering or providing service or access in the providing incumbent LEC's service area. We also tentatively conclude, however,

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[46] 47 U.S.C. § 259(b)(5).

[47] 47 U.S.C. § 259(b)(6).

[48] *See supra* Part III. A.

that the providing incumbent LEC has the burden of proving that the qualifying carrier is providing or offering services or access obtained pursuant to Section 259 to consumers in the providing incumbent LEC's telephone exchange area. We seek comment on these tentative conclusions and on how disputes concerning whether a qualified carrier has engaged in an infrastructure sharing agreement "for any services or access which are to be provided or offered to consumers by the qualifying carrier" in the providing incumbent LEC's telephone exchange area should be adjudicated by this Commission. Should such disputes be handled pursuant to Section 208 authority?[49] We also recognize that end users may be harmed if an infrastructure sharing agreement is terminated without notice. We seek comment on whether sixty days is reasonable notice for a providing incumbent LEC to provide a qualifying carrier if a providing incumbent LEC seeks to terminate an infrastructure sharing arrangement for cause pursuant to Section 259(b)(6). We seek comment on whether sixty days notice by a providing incumbent LEC will enable a qualifying carrier to provide sufficient notice to its customers. We also seek comment on whether a providing incumbent LEC should be required to notify the Commission before terminating infrastructure sharing arrangements. We also seek comment on whether the term "services or access" in Section 259(b)(6) applies to all "public switched network infrastructure technology, information, and telecommunications facilities and functions" available pursuant to Section 259(a), or whether Section 259(b)(6) limits an incumbent LEC's right to deny agreements to only a limited set of provisions, namely, "services or access."

28. Section 259(b)(7) requires that incumbent LECs file with the Commission or state for public inspection any tariffs, contracts or other arrangements showing the conditions under which the incumbent LEC is making available public switched network infrastructure and functions.[50] The *Local Competition First Report and Order* concluded that the 1996 Act requires all interconnection agreements, "including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996," to be submitted to the state commission for approval pursuant to Section 252(e). This requirement includes agreements between non-competing carriers.[51] We tentatively conclude that the filing requirement in Section 259(b)(7) refers only to agreements reached pursuant to Section 259, because qualifying carriers obtaining interconnection or access to unbundled elements pursuant to Section 251 or pursuant to agreements entered into prior to the enactment of the 1996 Act are under an obligation to file agreements with the state commission. We further tentatively conclude that incumbent LECs should be required to file all tariffs, contracts, or other arrangements reached pursuant to Section 259 with the appropriate state commission. We seek comment on these tentative conclusions. We also seek comment on whether an incumbent LEC must file agreements showing the rates, terms, and conditions under which such carrier is making available technology, information, and

[49] 47 U.S.C. § 208.

[50] 47 U.S.C. § 259(b)(7).

[51] *See Local Competition First Report and Order* at ¶¶ 165-171. This portion of the order has not been stayed by the Court of Appeals. *See supra* n.7.

telecommunications facilities and functions listed in Section 259(a) or whether Section 259(b)(7) is limited only to public switched network infrastructure and functions.

C. Requirements of Section 259(c)

29. Section 259(c) states that "a local exchange carrier to which this section applies that has entered into an infrastructure sharing agreement under this section shall provide to each party to such an agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment."[52] This requirement is similar to the network disclosure requirement of Section 251(c)(5) which requires incumbent LECs to "provide reasonable public notice of changes" that may affect the use of the incumbent LECs' facilities or networks.[53] The Commission has interpreted Section 251(c) to require notice of such changes that might affect the ability of parties, who have obtained interconnection pursuant to Section 251, to provide service.[54] We tentatively conclude that Congress intended Section 259(c) to provide similar notice to qualifying carriers of changes in the incumbent LECs' network that might affect qualifying carriers' ability to fully benefit from Section 259 agreements. We seek comment on this tentative conclusion.

30. Overall, we believe that harmonizing the disclosure requirements under Sections 259 and 251 also would promote the goal shared by Congress and the Commission to reduce duplicative administrative requirements. Similarly, we note that several other provisions, including Sections 273(c)(1)[55] and 273(c)(4)[56], and the Commission rules at 47 C.F.R. §64.702(d)(2) ("the all carrier rule")[57] and 47 C.F.R. §68.110(b), require companies to disclose information about their networks. We ask parties to address any potential overlap or conflict between Section 259(c) and existing network disclosure requirements. Is it possible or desirable

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[52] 47 U.S.C. § 259(c).

[53] 47 U.S.C. § 251(c)(5); *see also* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Second Report and Order*, CC Docket No. 96-98, FCC 96-333 (rel. Aug. 8, 1996) ("*Local Competition Second Report and Order*").

[54] *See Local Competition Second Report and Order* at ¶ 171.

[55] 47 U.S.C. § 273(c)(1).

[56] 47 U.S.C. § 273(c)(4).

[57] The term "all carrier rule" refers to the Commission's network disclosure rule contained in 47 C.F.R. § 64.702, as interpreted in the *Second Computer Inquiry*. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Memorandum Opinion and Order on Reconsideration*, 84 FCC 2d 50, 82-83 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

to harmonize Section 259(c) with these other network disclosure requirements? We seek comment on such an approach.

31. We tentatively conclude that the obligations to provide "timely information" under Section 259(c) should apply to incumbent LECs providing infrastructure to qualifying carriers.[58] We seek comment on this tentative conclusion. We note that Section 259(c) applies to incumbent LECs that have entered into an "infrastructure sharing agreement" and we tentatively conclude that the phrase "infrastructure sharing agreement" as used in Section 259(c) should be construed independently of any determination of the meaning of "public switched network infrastructure" in Section 259(b)(2). Specifically, for the purposes of Section 259(c), we believe that "infrastructure sharing agreement" should be applied to include agreements not only for public switched network infrastructure, but also for "technology, information, and telecommunications facilities and functions."[59] We believe that "infrastructure sharing agreement," per Section 259(c), refers to the title of Section 259, "Infrastructure Sharing," and that subsection (c) was intended to apply to the gamut of agreements obtainable under Section 259(a) and (b). Accordingly, we tentatively conclude that Section 259(c) applies to sharing agreements for "public switched network infrastructure, technology, information, and telecommunications facilities and functions" pursuant to Section 259(a) and (b). We seek comment on these tentative conclusions.

32. We seek comment on what kind of actions would trigger Section 259(c) obligations. We note that the section requires incumbent LECs to provide information on "the planned deployment of telecommunications services and equipment."[60] We invite comment on what would constitute "planned deployment." Does "planned deployment" refer to a "make/buy" decision at which point the incumbent LEC decides to manufacture itself, or to procure from an unaffiliated entity, products that affect telecommunications services or equipment or does it refer to some other point in the developmental process? Should there be some exception for market trials of new services or equipment?

33. While Section 259(a) contemplates agreements to share "public switched network infrastructure, technology, information, and telecommunications facilities and functions," Section 259(c) requires incumbent LECs to provide information about the planned deployment of "telecommunications services and equipment, including software or upgrades of software integral to the use or operation of such telecommunications equipment." We seek comment on the relationship of Section 259(a) to Section 259(c) and also to the definitions of "telecommunications services and equipment" in Section 3 of the 1934 Act, as amended.[61] Additionally, we seek comment on whether there might be any type of planned deployments that

[58] 47 U.S.C. § 259(c).

[59] *See* 47 U.S.C. § 259(a).

[60] 47 U.S.C. § 259(c).

[61] 47 U.S.C. § 153(45), (46).

would require incumbent LECs to notify qualifying carriers under Section 259 but might not require public notice under Section 251(c)(5).

34. We also seek comment on the type of "information" on planned deployments that incumbent LECs must provide to parties to Section 259 agreements.[62] We believe that, in order to ensure the effectiveness of the sharing agreements, a certain minimum level of information may be necessary to assist qualifying carriers in adjusting to deployments of new services and equipment. We request comment on whether the Commission should require that an incumbent LEC provide to the qualifying carrier the following information: 1) the date changes are to occur; 2) the location at which changes will occur; 3) the type of changes; 4) the reasonably foreseeable impact of those changes, including pricing implications; and 5) a contact person to provide supplemental information. Would these requirements provide a sufficient level of specificity to allow carriers to make informed and timely adjustments to planned deployments? Does Section 259(c), by requiring incumbent LECs to provide "*information* on planned deployments"[63] rather than mere "notice"[64] of planned deployments, contemplate some more specific type of guidance?

35. We seek comment on what constitutes "timely" information. Should the Commission establish a timetable for providing information, as the Commission did in its implementation of Section 251(c)(5)?[65] If so, what would be an appropriate timetable? In addition, we note that Section 259 requires notification of parties to Section 259 agreements, but does not appear to require notice to the general public. We seek comment on the implications of such a distinction. We tentatively conclude that the public notice provisions of Section 251(c)(5) do not suffice to meet the requirement of Section 259(c) that incumbent LECs provide notice to the parties to Section 259 agreements? We also seek comment on how the information on planned deployments should be communicated to parties. Should we require written notification to affected parties?

36. We also seek comment on the need for safeguards to ensure that competitively-sensitive, proprietary, or trade secret information of the incumbent LEC is not compromised. We seek comment on the use of nondisclosure agreements between parties to infrastructure sharing agreements as a means of protecting this type of information. Finally, we seek comment on what enforcement mechanisms, if any, should be employed to ensure compliance with the Section 259(c) requirements. Would the Commission's existing enforcement authority be adequate to ensure compliance?

D. Qualifying Carriers under Section 259(d)

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[62] 47 U.S.C. § 259(c).

[63] *Id.* (emphasis added).

[64] *See, e.g.*, 47 U.S.C. § 251(c)(5).

[65] *Local Competition Second Report and Order* at ¶¶ 214, *et seq.*

37. Section 259(d)(1) defines a qualifying carrier as one that "lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to this section."[66] "Economies of scale" exist where a lower unit cost of production can be achieved by a production process that is designed to produce a larger total quantity of a particular product or service.[67] Similarly, "economies of scope" exist where two or more products or services can be produced at a lower total cost if they are produced jointly rather than separately.[68] We request comment generally on how to determine whether a qualifying carrier lacks economies of scale or scope. Are there classes of carriers that would, *per se*, qualify as lacking economies of scale or scope? We noted above that Congress might have intended Section 259 for the benefit of smaller carriers. Should our Section 259(d)(1) inquiry assume a relationship between carrier size, however defined, and a determination that the carrier either has or lacks economies of scale or scope? We could, for example, create a presumption that a telecommunications carrier "lacks economies of scale or scope" if its operations are within the limitations on service area and access lines set forth in the definition of "rural telephone company" in Section (3)(37) of the Act.[69] Should the Commission determine whether carriers lack economies of scale or scope at the holding company level or at some other level? We note the apparently expansive scope of Section 259(a) which includes public switched infrastructure, technology, information, and telecommunications facilities and functions.[70] Could a carrier lack economies of scale or scope and, thus, qualify for infrastructure sharing pursuant to Section 259, for only some facilities or services available under Section 259(a), but have economies of scope or scale with respect to other facilities or services? Could certain incumbent LECs lack economies of scale or scope, and, thus, meet the Section 259(d)(1) definition of qualifying carrier and, nevertheless, also be required to *provide* "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to other qualifying carriers? We tentatively conclude that a factor to be considered in whether an otherwise qualifying carrier lacks economies of scale or scope is the cost of the investment that the carrier would incur to acquire on its own the requested infrastructure, relative to the cost that it would incur to obtain the requested

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[66] 47 U.S.C. § 259(d)(1).

[67] Economies of scale exist where relatively large producers can supply their products at a lower average cost per unit than relatively small producers. *See* F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance* 97 (1990).

[68] Economies of scope exist where it is less costly for a single firm to produce a bundle of goods or services together than it is for two or more firms, each specializing in distinct product lines, to produce them separately. *See, e.g.*, John C. Panzar and Robert D. Willig, *Economies of Scope*, 71 American Economic Review of Papers and Proceedings 268 (1981); William J. Baumol, John C. Panzar, and Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* 71-79 (1982); Daniel F. Spulber, *Regulation and Markets* 114-115 (1989).

[69] *See* 47 U.S.C. § 153(37).

[70] 47 U.S.C. § 259(a).

infrastructure from the incumbent LEC. We seek comment on all these issues and tentative conclusions.

38. Section 259(d)(2) adds the additional requirement that a "qualifying carrier" is one that "offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under Section 214(e).[71] A Federal-State Joint Board on universal service has recently recommended that the Commission adopt the statutory criteria set out in Section 214(e)(1) as its rule for determining which carriers are eligible to receive universal service support.[72] In addition, the Joint Board recommended that carriers be required to provide the following services or functionalities in order to be eligible to receive universal service support: voice grade access to the public switched network with the ability to place and receive calls; touch tone or dual tone multi-frequency signaling or its functional equivalent; single-party service; access to emergency services; access to operator services; access to interexchange services; and access to directory assistance.[73] The Joint Board further recommended that eligible carriers offer lifeline assistance to eligible low-income consumers and provide access to toll blocking and limitation services for qualifying low income consumers, to the extent eligible carriers are capable of providing such services.[74] The Commission, pursuant to Section 254(a)(2), must complete a proceeding to implement the Joint Board's recommendations on or before May 8, 1997.[75] Consequently, the Commission need not consider or construe Section 259(d)(2) in this rulemaking.

IV. PROCEDURAL ISSUES

A. *Ex Parte* Presentations

39. This is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules.[76] Written submissions, however, will be limited as discussed below.[77]

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[71] 47 U.S.C. § 259(d)(2).

[72] 47 U.S.C. § 254. *See also Joint Board Recommendation on Universal Service* at ¶¶ 155, *et seq.*

[73] 47 U.S.C. § 214(e)(1)(A); *See Joint Board Recommendation on Universal Service* at ¶¶ 45, *et seq.*

[74] *Id.*

[75] 47 U.S.C. § 254(a)(2).

[76] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

[77] *See infra* Part IV. D.

B. Initial Regulatory Flexibility Act Analysis

40. As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, the Commission has prepared the following Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities of the policies and rules proposed in the Notice of Proposed Rulemaking, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996 (*NPRM* or *Infrastructure Sharing NPRM*). Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in the *NPRM* but they must have a separate and distinct heading designating them as responses to this IRFA. The Secretary shall send a copy of this *Infrastructure Sharing NPRM* including the IRFA, set out below, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.[78]

41. *Need for and Objectives of the Proposed Rules*: The Commission is issuing this *NPRM* to implement the infrastructure sharing provisions in Section 259 of the 1934 Act, as added by the Telecommunications Act of 1996. Section 259 directs the Commission, within one year after the date of enactment of the 1996 Act, to prescribe regulations that require incumbent LECs to make certain "public switched network infrastructure, technology, information, and telecommunications facilities and functions" available to any qualifying carrier in the service area in which the qualifying carrier has requested and obtained designation as an eligible carrier under Section 214(e).[79]

42. *Legal Basis for the Proposed Rules*: The legal basis for action as proposed in the *NPRM* is Sections 1-5, 201-205, 218, and 259 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 151-155, 201-205, 218, and 259.

43. *Description and Estimate of the Number of Small Entities to which the Proposed Rules will apply*: For the purposes of this analysis, we examined the relevant definition of "small entity" or "small business" and applied this definition to identify those entities that may be affected by the rules proposed in this *NPRM*. The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[80] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria

[78] 5 U.S.C. § 603.

[79] 47 U.S.C. § 259. *See also* 47 U.S.C. § 214(e)(1).

[80] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

established by the Small Business Administration (SBA).[81] Moreover, the SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.[82]

44. Section 259 of the 1934 Act, as added by the 1996 Act, establishes a variety of infrastructure sharing obligations.[83] Many of the obligations proposed in the *Infrastructure Sharing NPRM* would apply solely to providing incumbent LECs.[84] Also potentially affected by these proposed rules are the class of carriers designated as "qualifying carriers" under Section 259.[85] Qualifying carriers will likely include small local exchange carriers and many of these carriers are likely to be small business concerns for the purposes of RFA analysis.

45. Consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of "small entity" and "small business concerns" for the purpose of this IRFA. We believe that incumbent LECs do not qualify as small businesses because they are dominant in their field of operation.[86] However, out of an abundance of caution and prudence, in this IRFA we shall include a discussion of the number of small incumbent LECs affected by these proposed rules to remove any possible issue of RFA compliance. Therefore, we shall use the distinct term "small incumbent LECs" to refer to any incumbent LECs that conceivably might be defined by the SBA at a subsequent date as "small business concerns" despite our conclusions that they are dominant in their fields of operation. We seek comment on the conclusions above.

46. We are first required to estimate the number of small incumbent LECs that may be affected by the proposed decisions and rules. Although neither the Commission nor the SBA has developed a definition of small providers of local exchange services, we have two methodologies available to us for making these estimates. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813) (Telephone Communications, Except Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the

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[81] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82, 89 (N.D. Ga. 1994).

[82] 13 C.F.R. § 121.201.

[83] 47 U.S.C. § 259.

[84] *See, e.g.*, 47 U.S.C. § 259(a).

[85] 47 U.S.C. § 259(a), (d).

[86] *See* 5 U.S.C. § 605(b).

end of 1992.[87] According to the SBA's definition, a non-radiotelephone company qualifies as a "small entity" when it employs fewer than 1,500 persons.[88] Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 companies (or, all but 26) were reported to have fewer than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small incumbent LECs or small entities based on these employment statistics. However, because it seems certain that some of these carriers are not independently owned and operated, this figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as "small business concerns" under the SBA's definition. Consequently, we estimate using this methodology that there are fewer than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the proposed decisions and rules and we seek comment on this conclusion.

47. Our alternative method for estimation utilizes the data that we collect annually in connection with the Telecommunications Relay Service (TRS). This data provides us with the most reliable source of information of which we are aware regarding the number of LECs nationwide. According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.[89] Although it seems certain that some of these carriers are not independently owned and operated (prong 1 of the SBA definition of small business concerns as set out *supra*), or have more than 1,500 employees (prong 3), we are unable at this time to estimate with greater precision the number of incumbent LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small LECs (including small incumbent LECs) that may be affected by the actions proposed in this *NPRM*.

48. The proposals in this *NPRM* apply not only to the providing incumbent LECs that are required to enter into infrastructure sharing agreements pursuant to Section 259, but also to qualifying carriers. Qualifying carriers are telecommunications carriers that meet the two requirements set out in Section 259(d). Because Section 259(d)(1) limits qualifying carriers to those carriers that "lack economies of scale or scope," it is likely that there will be small business concerns affected by the rules proposed in this *NPRM*. We note, however, that the definition of "qualifying carriers" is dependent on the Commission's decisions in the universal service proceeding.[90] Until the Commission issues an order pursuant to the *Universal Service NPRM* that

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[87] United States Department of Census, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("*1992 Census*").

[88] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[89] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996) ("*TRS Worksheet*").

[90] 47 U.S.C. § 259(d)(2). *See* Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking and Order Establishing Joint Board*, CC Docket No. 96-45, FCC 96-93 (re. Mar. 8, 1996) ("*Universal Service NPRM*").

addresses Section 214(e) eligibility issues, it is not feasible to define the number of "qualifying carriers" that may be "small business concerns."[91]

49. *Description of Projected Reporting, Recordkeeping and other Compliance Requirements:* As discussed in Part III. A., incumbent LECs may be required to make available to defined qualifying carriers "such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier[s]."[92] We believe that compliance with such requests may require the use of legal, engineering, technical, operational, and administrative skills. In addition, incumbent LECs are required to file with the Commission or state for public inspection any tariffs, contracts or other arrangements showing the conditions under which an incumbent LEC is making available public switched infrastructure and functions.[93] Should a small incumbent LEC be subject to this requirement, we anticipate that it will require use of legal and administrative skills. The statute also requires incumbent LECs to provide "timely information on the planned deployment of telecommunications services and equipment" to any parties to infrastructure sharing agreements.[94] Should a small incumbent LEC be subject to this requirement, we anticipate that it will require use of engineering, technical, operational, and administrative skills. We seek comment on the impact of these proposals on small entities. We seek comment on whether the entities subject to Section 259 will otherwise have the personnel or other resources to meet Section 259 requirements as a result of their efforts to comply with other provisions of the 1996 Act, *i.e.*, Section 251.

50. *Significant Alternatives to Proposed Rules which Minimize Significant Economic Impact on Small Entities and Accomplish Stated Objectives:* We anticipate that the impact of this proceeding should be beneficial to small businesses since they may be able to share infrastructure with larger incumbent LECs, in certain circumstances, enabling small carriers to provide telecommunication services or information services that they otherwise might not be able to provide without building or buying their own facilities.[95] The *Infrastructure Sharing NPRM* contains a detailed set of questions to allow commenters to assist the Commission in interpreting Section 259, including the following significant provisions of Section 259 that may impact small entities.

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[91] *See Universal Service NPRM; see also Joint Board Recommendation on Universal Service* (recommending eligibility criteria for carriers seeking universal service support). We note that the Commission must complete a proceeding to implement the Joint Board's recommendations on or before May 8, 1997.

[92] 47 U.S.C. § 259(a).

[93] 47 U.S.C. § 259(b)(7); *see supra* Part III. B.

[94] 47 U.S.C. § 259(c); *see supra* Part III. C.

[95] 47 U.S.C. § 259(a).

51. Section 259(a) requires the Commission to adopt regulations to ensure that incumbent LECs make available, to defined qualifying carriers, "public switched network infrastructure, technology, information, and telecommunications facilities and functions."[96] Qualifying carriers are defined in Section 259(d) as carriers that lack economies of scale or scope and that request and obtain designation to receive universal service support pursuant to Section 214(e). As a result of this limitation on the carriers that qualify for Section 259 sharing arrangements, we ask whether, in fact, the purpose of Section 259 is to benefit small carriers. In addition, we ask whether there is a relationship between carrier size, however defined, and a determination that the carrier either has or lacks economies of scale or scope. Additionally, we ask whether certain incumbent LECs could lack economies of scale or scope, and, thus, meet the Section 259(d)(1) definition of qualifying carrier and, nevertheless, also be required to *provide* "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to other qualifying carriers.

52. In addition, the statute directs the Commission to refrain from requiring actions by incumbent LECs that are economically unreasonable or contrary to the public interest.[97] The Commission may permit, but may not require, joint ownership of infrastructure, and must provide that incumbent LECs are not treated as common carriers by virtue of their Section 259 obligations.[98] In this *NPRM*, we seek comment on how to implement the above provisions. Section 259(b)(4) further directs the Commission to establish guidelines implementing infrastructure sharing on just and reasonable terms where qualifying carriers "fully benefit" from the economies of scale and scope enjoyed by incumbents, and to act so as to promote cooperation between LECs.[99] In construing Section 259(b)(4), we ask whether Section 259 conveys to the Commission the power to establish pricing rules or guidelines for public switched network infrastructure, technology, information, and telecommunications facilities and functions. We also ask questions about how such pricing authority could be implemented.[100]

53. Section 259(c) requires local exchange carriers that have entered into infrastructure sharing agreements to provide "timely information on the planned deployment of telecommunications services and equipment . . . ."[101] In the *NPRM*, we seek comment on how

[96] 47 U.S.C. § 259(a); *see supra* Part III. A.

[97] 47 U.S.C. § 259(b)(1).

[98] 47 U.S.C. § 259(b)(2).

[99] 47 U.S.C. § 259(b)(4).

[100] *See supra* Part III. B.

[101] 47 U.S.C. § 259(c).

the Commission both can implement Section 259(c) and promote the goal shared by Congress and the Commission of reducing duplicative administrative requirements.[102]

54. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules:* The *NPRM* tentatively concludes that the implementation of Section 259 should be complementary to the implementation of other sections of the 1996 Act and asks questions designed to explore that complementary relationship. The *NPRM*, for example, addresses the relationship between the infrastructure sharing requirements in Section 259 and the competitive access requirements in Sections 251 and 252.[103]

C. Initial Paperwork Reduction Act of 1995 Analysis

55. This *Notice of Proposed Rulemaking* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Notice of Proposed Rulemaking*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Notice of Proposed Rulemaking*; OMB comments are due 60 days from the date of the publication of this *Notice of Proposed Rulemaking* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

56. *General.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties shall file comments not later than December 20, 1996, and reply comments not later than January 3, 1997. To file formally in this proceeding, you must file an original and twelve copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and 16 copies. Comments and reply comments should be sent to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with copies to: Thomas J. Beers, Common Carrier Bureau, Industry Analysis Division, 2033 M Street, N.W., Room 500, Washington, D.C. 20554; Scott K. Bergmann, Common Carrier Bureau, Industry Analysis Division, 2033 M Street, N.W., Room

[102] *See supra* Part III. C.

[103] *See supra* Part III. A.

500, Washington, D.C. 20554; and, Kalpak Gude, Common Carrier Bureau, Policy and Program Planning Division, 1919 M Street, N.W., Room 544, Washington, D.C. 20554. Parties should file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

57. *Other requirements.* In order to facilitate review of comments and reply comments, both by parties and Commission staff, we require that comments be no longer than thirty (30) pages and reply comments be no longer than twenty (20) pages, including exhibits, appendices, and affidavits of expert witnesses. Empirical economic studies, copies of relevant state orders, and proposed rules will not be counted against these page limits. These page limits will not be waived and will be strictly enforced. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading although a summary that does not exceed three pages will not count towards the 30 page limit for comments or the 20 page limit for reply comments. The summary may be paginated from the rest of the pleading (*e.g.*, "i. ii"). Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commission's rules.[104] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments.

58. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to: Scott K. Bergmann, Common Carrier Bureau, Industry Analysis Division, 2033 M Street, N.W., Room 500, Washington, D.C. 20554. Such diskettes should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows software. The diskette should be submitted in "read only" mode. The diskette should be clearly labeled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

59. Written comments by the public on the proposed and/or modified information collections are due December 20, 1996, and reply comments are due January 3, 1997. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W. Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

[104] *See* 47 C.F.R. § 1.49.